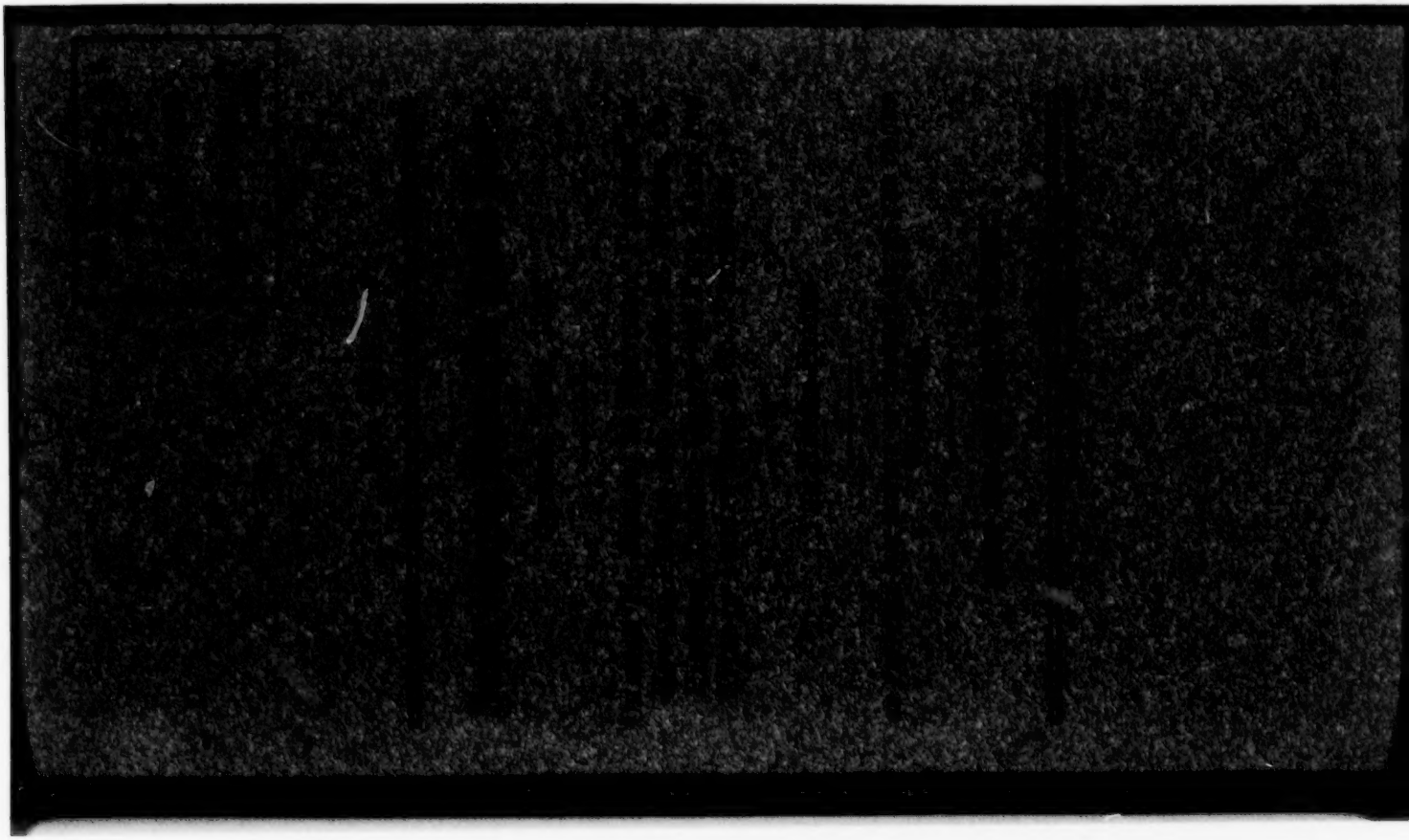
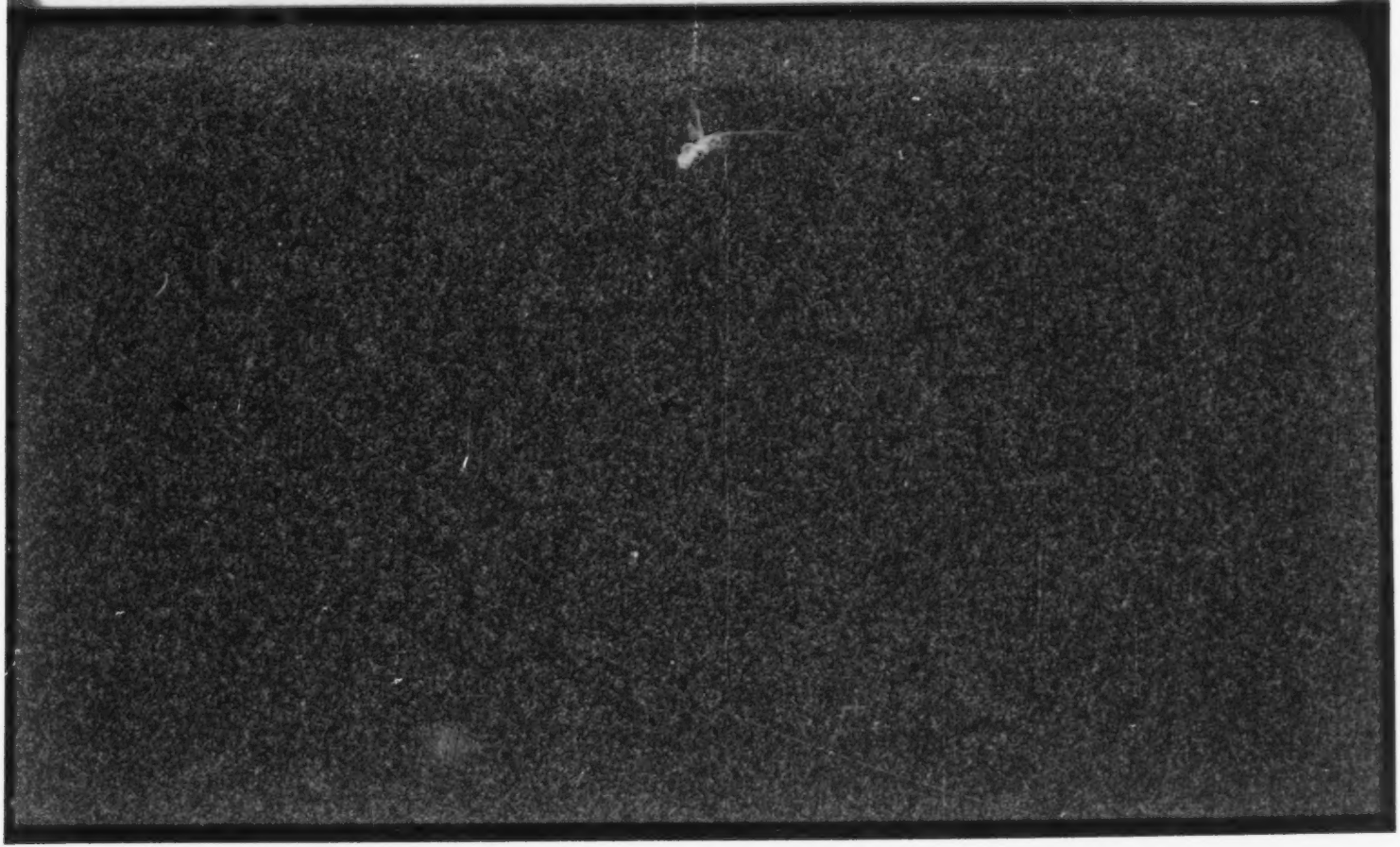




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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 531

CHARLES H. PHELPS, AS SURVIVING PARTNER OF Howard Phelps and Charles H. Phelps, Co-Partners, Trading Under the Firm Name and Style of Phelps Bros. & Co., Petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no written opinion in this case, but in its conclusion of law (R. 36, 37) made reference to the opinion in the case of *Booth & Co.* v. *United States*, Court of Claims No. C–1326. Neither this (the *Phelps case*) nor the *Booth case* have as yet been officially reported. The opinion in the *Booth case* appears at page 37 of the transcript herein. The Court of Claims rendered an opinion overruling a motion for a new trial in this

case (R. 40), which opinion has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 8, 1926. (R. 38.) A motion for a new trial was duly filed and entertained (R. 39), and overruled on May 24, 1926 (R. 40). The petition for certiorari was filed July 27, 1926. Jurisdiction to issue the writ is conferred upon this Court by Section 3(b) of the Act of February 13, 1925. (Chap. 229, 43 Stat. 936.)

STATEMENT

The petitioner is the surviving partner of a partnership (R. 21) which owned a lease made by the Bush Terminal Company as lessor to Phelps Bros. & Co. as lessee of Pier No. 7 of the Bush Terminal in the New York harbor. (R. 22.)

On December 31, 1917, the Secretary of War, by direction of the President, issued a general order "to whom it may concern," stating that "pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645," and "by section 10 of the act of Congress approved August 10, 1917, Pub. No. 41, 65th Cong.," "possession, and control is hereby taken, by direction of the President" of said Pier No. 7 of the Bush Terminal for use in the transportation of troops, war material, equipment, etc. (R. 22, 23.) The order also provided that "steps will be

promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises." (R. 23.) Thereafter, pursuant to orders of the quartermaster general of the Army, a notice was served upon petitioner which stated that " by authority of the President of the United States, the Bush Terminal has this day been requisitioned for the use of the Embarkation Service of the United States Army, and possession thereof has passed to the United States " (R. 24), and that, as it was not desired to inconvenience the present occupants, they should communicate with designated officers of the A ny and arrange for the vacation of these premises (R. 25). After several conferences the premises were vacated by petitioner and turned over to the United States (R. 25), which continued to occupy the same for some time thereafter (R. 25). Thereafter the adjutant general of the Army, pursuant to an order by the Secretary of War, appointed a board to ascertain and report the value of this leasehold interest of petitioner. (R. 26, 27.) The board made reports (R. 28, 31), the first report (R. 28) being a determination of the value of the leasehold, which amount was unsatisfactory to petitioner, who accepted 75 per cent thereof, " reserving to ourselves * * * the right to sue the United States to recover such further sums as added to said 75 per centum will make up such amount as will be just compensation " (R. 30). The second, or additional award (R. 31) cov-

ered the amount of the rent which petitioner had paid to the Bush Terminal Company for the account of the United States under the terms of its lease. This award was accepted by petitioner as satisfactory. (R. 33.) The Court of Claims found the value of the leasehold for the time so occupied by the United States and after deducting the payments theretofore made under the awards of the board of appraisers found that there was due to petitioner as the reasonable value of the use of said Pier No. 7 the additional sum of $254,175.79. (R. 36.) The petitioner claimed that to this value should be added interest from the date of the taking to the date of payment. The Court of Claims refused to allow interest, and the petitioner's motion for a new trial (R. 38, 39) was addressed to the interest question. The Court of Claims in its opinion overruling such motion expressly refuses to make such allowance. (R. 40.)

The sole question presented by this petition for a writ of certiorari is the ruling of the Court of Claims in refusing to allow interest from the date of taking to the date of payment upon the amount found by the Court of Claims to be the reasonable value of the property so taken by the United States.

THE STATUTES

The pertinent portion of the Act of August 29, 1916 (Chap. 418, 39 Stat. 619, 645), is as follows:

> The President, in time of war, is empowered, through the Secretary of War, to take

possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The pertinent portion of the Act of August 10, 1917 (Chap. 53, 40 Stat. 276, 279), is as follows:

SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies * * *.

ARGUMENT

The only question in this case is whether the Court of Claims, in awarding to the petitioner compensation for property taken by the United States under the power of eminent domain, should have allowed interest or its equivalent on the value of the property for the period between the date of the taking and the date of payment.

Interest was refused, and the petitioner was awarded in 1926 the value of the property taken, as of 1918, the date of taking.

The Court of Claims reasoned that its jurisdiction rested on Section 145 of the Judicial Code, giving it jurisdiction of claims "founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied," etc.; that the taking of the property gave rise to a contract to pay, and that Section 177 of the Judicial Code, providing that "no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," prevented the recovery of more than the value at the date of taking. It held that the suit must be one on contract, in order that the Court of Claims could have jurisdiction, and as there was no express provision for payment of "interest" none could be allowed. The lower court distinguished the case of *Seaboard Air Line*

Ry. v. *United States,* 261 U. S. 299, on the ground that it originated in the District Court and that the taking in that case was under Section 10 of the Lever Act, which gave jurisdiction to the District Courts to award "just compensation." Although the requisition in this case mentioned both the Act of August 29, 1916, and Section 10 of the Lever Act as its authority, the Court of Claims pointed out that under *United States* v. *Pfitsch,* 256 U. S. 547, the District Courts have exclusive jurisdiction of cases arising under Section 10 of the Lever Act, and the case must be dealt with in the Court of Claims, if it had jurisdiction at all, as if the taking were under the Act of August 29, 1916, which did not confer jurisdiction on any court, leaving the jurisdiction of the Court of Claims in this case dependent on Section 145 of the Judicial Code.

The decision of the Court of Claims produces the following results:

(1) The amount awarded for the property taken is admittedly less than the "just compensation" to which, under the Fifth Amendment as construed in the *Seaboard Air Line case,* petitioner was entitled, and the construction placed by the Court of Claims upon the Acts of Congress is that Congress, while giving the court jurisdiction to award compensation for property taken for public use, has directed that less than the constitutional "just compensation" shall be allowed.

(2) Although the implied contract relied upon to sustain the jurisdiction of the Court of Claims is one implied under the Fifth Amendment because of its requirement of "just compensation," and the implication that the United States intended to comply with the Constitution, nevertheless the compensation contemplated by the Constitution is more than may be awarded.

(3) Congress intended that if the petitioner had brought his suit in the District Court, under Section 10 of the Lever Act he could have recovered constitutional "just compensation," including interest to the date of payment, while in the Court of Claims he is limited to a less amount.

Such results suggest a pause to consider whether a proper conclusion has been reached.

To construe Section 177 of the Code, relating to interest, as preventing the allowance of the full compensation which the Fifth Amendment contemplates, raises a doubt as to the soundness of the result arrived at. If all that was said in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330, including the statement that the implied contract in such a case as this is to pay the value as of the date of the taking, is to be taken literally and as unqualified by the *Seaboard case*, the decision of the Court of Claims has much to support it.

The questions presented in this case have given rise to much argument before the Court of Claims.

Other cases are pending which involve them. They are questions affecting the constitutional rights of citizens, and nothing short of a decision of this Court will lay them at rest. The United States does not oppose the issuance of the writ.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

SEPTEMBER, 1926.

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IN THE

Supreme Court of the United States

No. 531. **October Term, 1926.**

CHARLES H. PHELPS, as Surviving Partner of Howard Phelps and Charles H. Phelps, Copartners, Trading Under the Firm Name and Style of Phelps Bros. & Co.,

v.

THE UNITED STATES OF AMERICA.

ON CERTIORARI TO THE COURT OF CLAIMS.

Brief of Ira Jewell Williams, John H. Stone and F. R. Foraker, as *Amici Curiae*.

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IN THE

Supreme Court of the United States.

October Term, 1926. No. 531.

CHARLES H. PHELPS, AS SURVIVING PARTNER OF HOWARD PHELPS AND CHARLES H. PHELPS, CO-PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF PHELPS BROS. & Co.,

v.

THE UNITED STATES OF AMERICA.

BRIEF OF IRA JEWELL WILLIAMS, JOHN H. STONE AND F. R. FORAKER, AS AMICI CURIÆ.

STATEMENT OF QUESTION INVOLVED.

Where a terminal is requisitioned and a tenant required to vacate are not the tenant's rights "taken" and the tenant entitled to just compensation, including just compensation for delay in payment?

I. PETITIONER'S PROPERTY WAS TAKEN.

The Secretary of War requisitioned certain portions of the Bush Terminal, including those in which

petitioner had an estate for years. The requisition purported to be pursuant to

> Act of August 29, 1916, 39 Statutes 645, providing for possession and control of systems of transportation "or any part thereof," and
> Act of August 10, 1917, Sec. 10 (Lever Act), authorizing the requisitioning of storage facilities.

Petitioner was given notice to vacate. A Board of Appraisers valued the property and made an award to petitioner, including interest. The award was declined, petitioner was paid 75 per cent., and brought suit in the Court of Claims. The Commissioner found that petitioner was entitled to interest. The Government submitted without objection, but the Court found that interest could not be allowed because of Section 177 of the Judicial Code. The order of the Secretary of War referred to the

> "following described parts of a system of transportation, including storage facilities . . . to the end that they may be utilized to the exclusion of all other traffic . . . for the transportation of troops, war material and equipment . . . and for such other purposes connected with the emergency as may be needful or desirable."

The conclusion is unavoidable that petitioner's property was "taken." There has been no suggestion on the part of the Government, or of the Court below, that the requisition and the notice to vacate did not constitute a taking. The Act of 1916 clearly gave authority for the possession and control of systems of transportation "or any part thereof" and the Secretary of War affecting to act, *inter alia*, under that act,

viewed the terminal docks as "parts of a system of transportation."

This Court held, reversing the Court of Claims, that there was a taking:

> Duckett v. United States, 266 U. S. 149 (1924).

The judgment below is entered on the theory that there was a taking and that there was jurisdiction to award compensation because of such taking.

II. TAKING NECESSARILY ENTITLES TO JUST COMPENSATION.

> "Nor shall private property be taken for public use without just compensation."

Petitioner's property has been taken for public use. Petitioner is entitled to just compensation.

The Court below held that petitioner was entitled to just compensation. But not true just compensation.

III. JUST COMPENSATION ALWAYS MEANS TRUE JUST COMPENSATION.

In every court existing under the Constitution in which judges sit sworn to obey the Constitution, "just compensation" must mean what it means in the Constitution, namely, true just compensation.

"Just compensation" cannot mean one thing in the Court of Claims and another thing in the District Court; one thing in this court on appeal from the

Court of Claims and another thing on appeal from the District Court.

The only possible concept of just compensation involves the element of just compensation for delay in payment. The compensation for such delay is a part of just compensation itself, necessarily and indissolubly associated therewith.

Affecting to award just compensation, the Court below did not award just compensation because it did not award true just compensation—the only kind of just compensation known to the Constitution and to the law.

IV. THE COURT BELOW WAS NOT PROHIBITED FROM AWARDING TRUE JUST COMPENSATION.

The curious result reached by the Court below arose from giving a double meaning to "just compensation." In the reasoning of the Court is the assumption that there can be two kinds of just compensation—just compensation with interest and just compensation without interest. This is untrue. There can be but one just compensation—true just compensation. The citizen must be made whole. He can be made whole in only one way. Anything less than true just compensation is not just compensation.

The Court below held that it was disabled by a positive prohibition of the Revised Statutes from awarding true just compensation. The statute means no such thing. No statute could conceivably mean any such thing. The statute does not apply to cases of taking of private property or set up a standard of compensation other than true just compensation.

The fundamental law says that just compensation must be paid for private property taken for public use.

The Congress authorizes the taking of private property for such use. The Secretary of War takes private property for public use. The Court has jurisdiction to award just compensation. The Court says it may not award true just compensation because there is a section of the Revised Statutes prohibiting the payment of interest.

But that section was not intended to apply to cases of just compensation for delay in payment for private property taken for public use. The mandate of the Constitution is the supreme law. Presumably Congress intended that mandate to be obeyed. There is no evidence of any actual intent on the part of Congress that the Constitution should be disobeyed. Can it be imagined that Congress by implication intended to provide that just compensation should *not* be paid for parts of railway transportation systems taken under the Act of 1916, but that just compensation *should* be paid for storage facilities taken under the Act of 1917? It will not be presumed that Congress intended an unconstitutional result. It will not be presumed that Congress intended an absurd result. The general yields to the particular. The obligation to pay true just compensation is explicit, precise and unavoidable. Section 177 cannot be expanded or construed so as to control the later and conclusive evidence of the legislative will.

To use the language of "implied contract" may merely darken thought. The bedrock of the matter is the Constitution. Based thereon is a law of Congress authorizing the "taking." The jurisdiction under the Constitution and that law is to award true just compensation. If resort must be had to contractual terminology, the implied contract is to pay true just compensation, not to violate the Constitution and the law by paying anything other or less than true just compensation.

CONCLUSION.

Business is predicated upon good faith and fair play. The Government has power to take the property of certain citizens to the exclusion of the property of other citizens; frequently with untoward consequences to the former. Those allowed to remain in the enjoyment of their property become possessed forthwith of the fruits of such enjoyment. Those from whom property is taken must accept that which is offered (not always adequate in amount or predicated upon correct principles), or bring suit. The Government may continue to assert that the wholly inadequate amounts offered are just compensation. The court, years later, decides that the citizen is right and entitled to be made whole. But the Court below says that that Court may not enter a judgment making the citizen whole; that Congress has disabled a court of justice from granting true just compensation. The concept is well-nigh unthinkable. To take without any compensation is to confiscate. To withhold payment for many years and not to compensate for such delay is likewise to confiscate.

The supreme law of the land requires that this petitioner receive true just compensation.

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